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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 DONNA I. KING-CAMERON,
11 Plaintiff,

Civil No. 05-6209-AA
OPINION AND ORDER

12 vs.

13 JO ANNE B. BARNHART,
14 Commissioner of Social Security,
15 Defendant.

16 Kathryn Tassinari
17 Mark Manning
18 Harder, Wells, Baron & Manning, P.C.
19 474 Willamette, Suite 200
20 Eugene, Oregon 97401
21 Attorneys for plaintiff

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24 District of Oregon
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27 Attorneys for defendant

28 AIKEN, Judge:

Claimant, Donna King-Cameron, brings this action pursuant
to the Social Security Act (the Act), 42 U.S.C. § 405(g), to

1 obtain judicial review of a final decision of the Commissioner.
2 The Commissioner denied plaintiff's application for Disability
3 Insurance Benefits (DIB) under Title II of the Social Security
4 Act, and for Supplemental Security Income (SSI) disability
5 benefits under Title XVI. 42 U.S.C. §§ 401-33, 1381-83f. For
6 the reasons set forth below, the Commissioner's decision is
7 reversed and remanded for further proceedings as stated below.

8 **PROCEDURAL BACKGROUND**

9 Plaintiff protectively filed her application for DIB and
10 SSI benefits on March 20, 2002. Tr. 12. She alleged disability,
11 commencing January 5, 1996, due to emphysema, asthma, chronic
12 pneumonia, heart disease, and hepatitis. Tr. 12, 55-58, 318-20.
13 Her applications were denied initially, tr. 12, 40-44, 322-326,
14 and upon reconsideration. Tr. 12, 47-49, 328-330. On June 18,
15 2004, a short hearing was held before a Administrative Law Judge
16 (ALJ) and then rescheduled to allow plaintiff an opportunity to
17 obtain representation. Tr. 331-35. On October 7, 2004, another
18 hearing was held where plaintiff was represented by an attorney.
19 On January 28, 2005, the ALJ issued a decision denying
20 plaintiff's applications for disability. Tr. 12-20. The Appeals
21 Council denied plaintiff's request for review making the ALJ's
22 decision the final agency decision. See 20 C.F.R. §§ 404.981,
23 416.1481, 422.210.

24 **STATEMENT OF THE FACTS**

25 Plaintiff was 45 years old at the time of the hearing. Tr.
26 340. She left school after the Ninth grade and has not obtained
27 a GED. Tr. 342. Plaintiff has past work experience as a
28 bartender, cleaner, machine washer, and home health aide. Tr.

378-381.

STANDARD OF REVIEW

This court must affirm the Secretary's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Hammock v. Bowen, 879 F.2d 498, 501 (9th Cir. 1989). Substantial evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). The court must weigh "both the evidence that supports and detracts from the Secretary's conclusions." Martinez v. Heckler, 807 F.2d 771, 772 (9th Cir. 1986).

The initial burden of proof rests upon the claimant to establish disability. Howard v. Heckler, 782 F.2d 1484, 1486 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected . . . to last for a continuous period of not less than 12 months. . . ." 42 U.S.C. § 423(d) (1) (A).

The Secretary has established a five-step sequential process for determining whether a person is disabled. Bowen v. Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502, 416.920. First the Secretary determines whether a claimant is engaged in "substantial gainful activity." If so, the claimant is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R. §§ 404.1520(b), 416.920(b).

1 In step two the Secretary determines whether the claimant
2 has a "medically severe impairment or combination of
3 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.
4 §§ 404.1520(c), 416.920(c). If not, the claimant is not
5 disabled.

6 In step three the Secretary determines whether the
7 impairment meets or equals "one of a number of listed impairments
8 that the Secretary acknowledges are so severe as to preclude
9 substantial gainful activity." Id.; see 20 C.F.R.
10 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
11 presumed disabled; if not, the Secretary proceeds to step four.
12 Yuckert, 482 U.S. at 141.

13 In step four the Secretary determines whether the claimant
14 can still perform "past relevant work." 20 C.F.R.
15 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
16 disabled. If she cannot perform past relevant work, the burden
17 shifts to the Secretary. In step five, the Secretary must
18 establish that the claimant can perform other work. Yuckert, 482
19 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
20 (f). If the Secretary meets this burden and proves that the
21 claimant is able to perform other work which exists in the
22 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
23 416.966.

24 DISCUSSION

25 (1) The ALJ's Findings

26 At step one, the ALJ found that plaintiff had engaged in
27 intermittent substantial gainful activity since the alleged onset
28 date. Tr. 19, Finding 2. See 20 C.F.R. §§ 404.1520(a)(4)(I),

1 416.920(a)(4)(I). This finding is not in dispute.

2 At step two, the ALJ found that plaintiff had severe
3 impairments of emphysema and asthma. Tr. 13, 19, Finding 3. See
4 C.F.R. §§ 404.1520(a)(4)(II), 416.920(a)(4)(ii). This finding is
5 not in dispute.

6 At step three, the ALJ found that plaintiff's impairments
7 did not meet or equal the requirements of a listed impairment.
8 Tr. 19, Finding 4. See 20 C.F.R. §§ 404.1520(a)(4)(iii),
9 404.1520(d), 416.920(a)(4)(iii), 416.920(d). This finding is in
10 dispute.

11 The ALJ determined that plaintiff had the residual
12 functional capacity (RFC) to perform modified light/sedentary
13 work, specifically, that she could lift and carry up to 10 pounds
14 occasionally and frequently; stand/walk up to two hours, and sit
15 for up to six hours; and that she should avoid pulmonary
16 irritants. Tr. 20, Finding 6. See 20 C.F.R. §§ 404.1520(e),
17 404.1545, 416.920(e), 416.945. This finding is in dispute.

18 At step four, the ALJ found that plaintiff was not able to
19 perform any of her past relevant work. Tr. 20, Finding 7. See
20 20 C.F.R. §§ 404.1520(a)(4)(iv), 404.1520(f), 416.920(a)(4)(iv),
21 416.920(f). This finding is not in dispute.

22 At step five, the ALJ found that, based on plaintiff's RFC,
23 age, education and work experience, she could perform other work
24 existing in significant numbers in the national economy.
25 Specifically, the jobs of cashier II, addresser, and sedentary
26 assembler. See 20 C.F.R. §§ 404.1520(g), 416.920(g). This
27 finding is in dispute.

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1 (2) Plaintiff's Assertion of Error - Combination of Plaintiff's
2 Impairments

3 Plaintiff argues that the ALJ erred in failing to consider
4 whether the combination of plaintiff's impairments, including her
5 pulmonary condition, equaled a Listing.¹ A condition is
6 considered to "equal a listing" if it is equivalent to the listed
7 impairment both in terms of severity and duration, although it
8 does not exactly meet the specified terms. 20 C.F.R. § 404.1526.
9 If a plaintiff is not working and has a severe impairment, step
10 three mandates:

11 If you have an impairment(s) which meets the duration
12 requirement and is listed in Appendix 1 or is equal
13 to a listed impairment, we will find you disabled
without considering your age, education, and work
experience.

14 20 C.F.R. § 404.1520(d).

15 Medical equivalence is established if the medical findings
16 are at least equal in severity and duration to the listed
17 findings. Marcia v. Sullivan, 900 F.2d 172, 176 (9th Cir. 1990).
18 A mere statement by the ALJ that a plaintiff does not meet the
19 listing is inadequate. Id. Plaintiff argues that although the
20 ALJ discussed the listing and explained why the new test results
21 did not meet the specific criteria of Listing 3.02, the ALJ
22 failed to address equivalency. See Clifton v. Chater, 79 F.3d
23 1007, 1009 (9th Cir. 1996) (ALJ is required to discuss the evidence
24 and explain the reasons why claimant's impairment does not meet
25 or equal a listing).

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28 ¹ Listing 3.02 (chronic pulmonary insufficiency).

1 Here, plaintiff presented evidence that she is specifically
2 limited by her pulmonary condition, particularly when it is
3 considered in combination with her other medical conditions,
4 cardiomyopathy and hepatitis. Plaintiff's treating physician
5 states that her medical problems would make it impossible for to
6 work or tolerate working for any significant period of time. Tr.
7 313. Plaintiff presented evidence to show that her pulmonary
8 condition is very close to the criteria of Listing 3.02. Tr.
9 311-12. In fact, the ALJ acknowledged that plaintiff's condition
10 "potentially" met the listing, but expressed concern that
11 plaintiff's treating physician, Dr. Jacobson, did not address all
12 the criteria of the listing. Tr. 16. An ALJ is required to
13 discuss the evidence and explain the reasons why plaintiff's
14 impairment does not meet or equal a listing. Clifton, 79 F.3d at
15 1009.

16 Plaintiff asserts the case should be remanded for further
17 consideration of this issue. I agree and find that the ALJ did
18 not properly consider this issue under the listings and therefore
19 remand the case to allow the ALJ to address the equivalency issue
20 and to obtain any necessary clarification from Dr. Jacobson.

21 The court will not address plaintiff's remaining
22 allegations of error finding that remanding the case for further
23 administrative proceedings to complete the record is necessary
24 prior to any further review for alleged error.

25 CONCLUSION

26 The Commissioner's decision is reversed and remanded for
27 further proceedings as specified above.

28 IT IS SO ORDERED.

1 Dated this 21 day of July 2006.

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5 /s/ Ann Aiken

6 Ann Aiken

7 United States District Judge
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